IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1375 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 to 5 No

ASHOKKUMAR I ANJARIA

Versus

GOVT OF GUJARAT

Appearance:

MR YS MANKAD for Petitioner No. 1

MR AJ DESAI AGP for Respondent No. 1

MR HL JANI for Respondents No. 2-4

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 03/12/2001

C.A.V. JUDGEMENT

1. This petition is filed for regularisation in service, for equal pay for equal work and under apprehension of termination of service of the petitioner by respondent No.2 - Gujarat Maritime Board (hereinafter referred as 'the Board' for short). The petitioner was initially appointed as Class III Group-C clerk on daily wage basis since 18.4.1984. He claims to have put in continuous service since then. As the petitioner knew typing, he was given the work of typing by the order dated 11.12.1985. Even as he continued to serve regularly and satisfactorily, his appointment was never regularised resulting into a wide gap between the daily wage paid to him and the regular pay-scale accorded to other permanent clerks doing the same work. Ironically, many other employees employed on daily rate basis in Group-D Class IV cadres raised industrial dispute and were awarded by the Industrial Tribunal the benefits of regularisation after 5, 10 or 15 years of service. And the respondent employer itself has made the necessary orders consequent to the award of the Industrial Tribunal for regularising the service of the clerks who were juniors to the petitioner, according to the petition. The petitioner was, however, pending the petition, granted the benefits of the Government Resolution dated 17.10.1988. The petitioner has, therefore, by amending the petition, claimed parity in wages and regularisation of service on the same basis as the clerks junior to the petitioner, who were granted the benefits under an award of the Industrial Tribunal. Under such circumstances, under the impression that the petitioner was denied the benefits only because of the pendency of his case in this Court, the petitioner had also urged in the amendment that the hearing of this petition deserved to be expedited. Thus, the initial prayers for regularisation and protection have subsequently found support of similar cases decided by the Industrial Tribunal. One more subsequent development was that by the order dated 6.8.1998, the petitioner was appointed on a temporary basis as a clerk-cum-typist on a vacant post in the Dredging Cell Department of the Board. That was, however, cancelled within a month. It must be mentioned here that while admitting the petition in the year 1988, the interim relief of injunction against termination was expressly refused with the clarification that the petitioner's service shall not be terminated otherwise than in accordance with law. At the same time, on 23.3.1988, the respondents were directed to file affidavit-in-reply latest by 30.6.1988.

2. As against the aforesaid contentions, prayers and directions, an affidavit-in-reply of the Administrative

Officer of the Board executed on 10.3.2000 and an affidavit of the Under Secretary, Port and Fisheries Department executed on 25.9.2001 are filed on behalf of the respondents. It is stated on behalf of the respondents that the petitioner was appointed as a daily rated clerk on nominal muster roll without following any recruitment procedure; that it was not possible to absorb the petitioner directly on a permanent post of a junior clerk bypassing the recruitment procedure prescribed by the Government; that his duties and responsibilities are not the same as that of a permanent employee of the Department; that he was free to give up the job if the daily rate-pay fixed by the respondent was not acceptable to him and that there was no threat of termination of his service.

The Government has, in the affidavit of the Under Secretary, stated that the case of the daily rated persons was considered and the Resolution dated 17.10.1988 was made which was also accepted by the respondent Board. The petitioner was given the benefits accordingly, but as for the absorption of the petitioner on the permanent set up, the petitioner ranked at serial No.11 in the seniority list as submitted by the Board on 9.3.1998. It is also submitted that, at present, no permanent vacant post is available for English typist and, therefore, the petitioner has not been given the status of the clerk-cum-typist in the Board; that the order dated 6.8.1998 temporarily appointing the petitioner as clerk-cum-typist was cancelled when the attention was drawn to the fact that the petitioner was at serial No.11 in the select list; and that the petitioner was informed by letter dated 1.3.2000 that his services would be regularised as and when his turn comes. It is further submitted that the Resolution dated 17.10.1988 itself does not make any distinction amongst the persons who are similarly situated. It is also stated that daily rated employees are regularised in accordance with the said Resolution despite there being no vacancies.

3. Thus, against the above factual background, the controversy is narrowed down to the contentious issue of the petitioner being treated as a beneficiary of the Resolution dated 17.10.1988 and made to wait for regularistion at serial No.11 in the select list even as the services of the similarly situated clerks junior to him were regularised with retrospective effect and the concomitant benefits were accorded to them under the award of the Industrial Tribunal. The irony stood compounded when it was given out by the learned counsel

for the respondents that the main reason for the petitioner being left out was that there was no award in his favour and that even the order of his appointment as a clerk-cum-typist on a permanent vacant post had had to be cancelled under pressure from the union and the employees who stood above the petitioner in the select list of the beneficiaries of the Resolution dated 17.10.1988.

4. On the legal aspect of the matter, it may be apposite to refer at the outset to recent observations of the Apex Court in GUJARAT AGRICULTURAL UNIVERSITY v. RATHOD LABHU BECHAR [AIR 2001 SC 706], which read as under:

> "16.... It is also well-settled, if work is taken by the employer continuously from daily wage workers for a long number of years without considering their regularisation for its financially gain as against employees legitimate claim, has been held by this Court repeatedly as an unfair labour practice. In fact, taking work, from daily wage worker or ad-hoc appointee is always viewed to be only for a short period or as a stop gap arrangement, but we find new culture is growing to continue with it for a long time, either for financial gain or for controlling its workers more effectively with sword of damocles hanging over their heads or to continue with favoured one in the cases of ad-hoc employee withstaling competent and legitimate claimants. Thus, we have no hesitation to denounce this practice. If the work is of such a nature, which has to be taken continuously and in any case when this pattern become apparent, when they continue to work for year after year, only option to the employer is to regularise them. Financial viability no doubt is one of the considerations but then such enterprise or institution should not spread its arm longer than its means. The consequent corollary is, where work is taken not for a short period or limited for a season or where work is not of part time nature and if pattern shows work is to be taken continuously year after year, there is no justification to keep such persons hanging as daily rate workers. In such situation a legal obligation is cast on an employer if there be vacant post to fill it up with such workers in accordance with rules if any and where necessary by relaxing the qualifications, where long experience could be

equitable with such qualifications. If no post exists then duty is cast to assess the quantum of such work and create such equivalent post for their absorption."

It is further observed as under:

"26..... We feel that daily rate workers who have been working on the aforesaid posts for such a long number of years without complaint on these posts is a ground by itself for the relaxation of the aforesaid eligibility condition. It would not be appropriate to disqualify them on this ground for their absorption, hence Clause 1 (a) need modification to this effect."

The following observations of the Apex Court in BHAGWATI PRASAD v. DELHI STATE MINERAL DEVELOPMENT CORPORATION [AIR 1990 SC 371] are also quoted in the above judgment.

"27.....The initial minimum educational qualification prescribed for the different posts is undoubtedly a factor to be reckoned with, but it is so at the time of the initial entry into the service. Once the appointments were made as daily rated workers and they were allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualifications."

5. The learned counsel for the respondents relied upon the judgment of the Supreme Court in DR.SURINDER SINGH JAMWAL v. STATE OF JAMMU & KASHMIR [AIR 1996 SC 2775], which case was squarely covered by the judgment in J & K PUBLIC SERVICE COMMISSION v. DR.NARINDER MOHAN [(1994) 2 SCC 630]. In the facts of that case, a direction was issued to the State Government to notify the vacancies to the Public Service Commission which would process and complete the selection as early as possible and the State Government was directed to make appointments in the order mentioned in the selection list. In the meantime, the ad-hoc doctors were ordered to continue till the regularly selected candidates were appointed. The ad-hoc appointees were held to be entitled to apply for selection and in case of any of them being age-barred, the Government was directed to consider the case for necessary relaxation of the age

qualification. The basic facts of this case are altogether different insofar as there is no question or proposal of fresh recruitment by the respondents and the claim is practically for earlier regularisation in view of the employees junior to the petitioner having been since long regularised.

6. As noticed earlier, in the facts of this case, the petitioner is already accorded the benefits available to him under the Government Resolution dated 17.10.1988 as accepted and implemented by the Board. It is also a fact on record that one Tushar Manshukhlal, junior clerk appointed on 30.5.1988 on daily wage basis, was confirmed from that date as a regular employee with an order to pay the wages and other benefits with arrears by the Board's order dated 10.7.1996, pursuant to the award of the Labour Court. Pending this petition, the petitioner has not raised an industrial dispute pursuant to which it could have been decided on facts whether the petitioner was senior to the aforesaid junior clerk and whether he could have been treated at par with the other beneficiaries of the awards of the Labour Court or the Industrial Tribunal. However, the order dated 6.8.1998 of the Board clearly states that the petitioner was transferred and appointed on 11.3.1997 to work as typist in the office of the Executive Engineer, Dredging Cell Department, Bhavnagar. By the said order dated 6.8.1998, he was appointed, albeit "temporarily", on the vacant post of clerk-cum-typist on the basis that no other clerk senior to the petitioner was available for such posting. Thus, the Board itself had, recognising the seniority and utility of the petitioner as typist, appointed him on the post of clerk-cum-typist against a vacancy. The said order was cancelled without any express reason or an opportunity of being heard and, as given out on behalf of the Board, under pressure from the union and the employees who stood above the petitioner in the seniority list of the beneficiaries of the Resolution dated 17.10.1988. Under such circumstances, it would be necessary and in the interest of justice that the order dated 3.9.1998 cancelling the petitioner's appointment on the vacant post of clerk-cum-typist is set aside and in view of the petitioner's regular working on that post from 11.3.1997, his service is regularised on that post with all the concomitant benefits. Accordingly, it is ordered that the respondent shall regularise the service of the petitioner on the post of clerk-cum-typist with effect from 11.3.1997 and pay him the arrears of the

difference of wages and other benefits and refix his salary accordingly within two months of receipt of a copy

of this order. Rule is made absolute to that extent with no order as to costs.

Sd/-

(D.H.Waghela, J.)

(KMG Thilake)